UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, DC

TEMECULA MECHANICAL, INC.

and

Cases 21-CA-39667
21-CA-39834

PLUMBERS AND PIPEFITTERS LOCAL 398,
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Submitted by:

Lisa McNeill
Counsel for the Acting General Counsel
National Labor Relations Board, Region 21
lisa.mcneill@nlrb.gov

TABLE OF CASES

NLRB CASES

SUPREME COURT CASES AND CIRCUIT CASES

TABLE OF CONTENTS

I. PROCEDURAL HISTORY

On May 17, 2012, the ALJ issued his decision and order. The ALJ found that Respondent violated Section 8(a)(1) by interrogating, threatening, and creating the impression that employees' Union activities were under surveillance; and violated Section 8(a)(3) by failing to recall employee Guardado to work.[1]

II. FACTS

A. Overview and Background

Temecula Mechanical, Inc. ("Respondent") is a family-owned and operated plumbing and site utility company. Patrick Leonard is the owner and president; while MaryLou Leonard, his wife, is the vice president; and Pamela Leonard, his daughter, is the secretary, project manager, and is responsible for the job bidding process. (ALJD 2: 20-24) (Tr. 200, 236, 301)[2] Many of Respondent's job projects are public works projects, requiring adherence to statutory prevailing wage rate standards. (ALJD 2: 47-48) (Tr. 303)

Norman Guardado ("Guardado") began working for Respondent in 2002 as a pipe tradesman. (ALJD 2: 24) (Tr. 77-78). Sandra Covarrubias ("Covarrubias"), Guardado's wife, began working for Respondent in 2007. Covarrubias worked as an office employee, answering phone, preparing job project bidding documents, and performing general office work. (ALJD 2: 26) (Tr. 29, 46, 265) Covarrubias, Guardado, and Pamela Leonard are personal friends and Pamela Leonard is godmother to Guardado and Covarrubias' son. (ALJD 2: 26-27) (Tr. 41, 201)

---

[1] The ALJ did not find that Respondent unlawfully laid off Guardado.

[2] All citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). The All citations to the ALJ's decision will be referred to as "ALJD" followed by the appropriate page number(s). All citations to Respondent's Exceptions will be referred to as "RE" followed by the appropriate number and citation to Respondent's Exceptions Brief will be referred to as "RB" followed by the appropriate page number(s). General Counsel's exhibits will be referred to as "GCX" followed by the appropriate number(s). Respondent's exhibits will be referred to as "RX" followed by the appropriate number(s).

B. Work Performed by Respondent

Site work is work that is typically performed outside of the building. (Tr. 137) Pipe tradesmen employees perform the site work, which includes pipe tradesmen includes: trenching the site; installing gas, sewer, water pipes and storm drains from the city main lines to the building structure; and cleaning up the jobsite. (ALJD 2: 32-33) (Tr. 77-78, 247) Pre-slab work is underground plumbing work performed inside the building before the concrete floor is poured. (ALJD 2: 33-34) Topout work is plumbing work preformed on top of or after the foundation has been laid inside the building, in the ceiling, and in the walls. Apprentices and journeymen plumbers perform pre-slab and topout work inside the building structure, including running water, gas, sewer pipes in the walls and installing water heaters and all other plumbing related items. (ALJD 2: 35-37)

Over the years that Guardado worked for Respondent, although he never entered or completed an apprenticeship program, he performed more than pipe tradesmen work. (Tr. 103-104) Guardado also worked as a plumber inside of buildings, running pipe for water, gas, and sewer; installing roof vents; installing roof drains; installing condensation lines; installing water heaters; installing sinks, toilet, and other plumbing fixtures. (ALJD 2: 38-41) (Tr. 78, 112) While working with Respondent, Guardado had no disciplinary issues and Respondent presented no evidence showing that it experienced of performance problems with Guardado's work skills and abilities. (ALJD 2: 44-45)

C. The Banning High School Jobsite

In about February 2010, Guardado was assigned to work at Respondent's Banning High School jobsite, located in Banning, California ("Banning jobsite"), a prevailing wage jobsite, along with Esteban Delgado ("Delgado"), apprentice employee, and Art Rivera ("Rivera"), foreman. (ALJD 3: 1-4) The entire time while Guardado worked at the Banning jobsite, he performed plumbers' work inside the building but he was paid pipe tradesmen wages.

D. Employees' Union Involvement and Complaints to the Labor Compliance Department

1. Labor Compliance Visits

Companies working on public works job projects are required to maintain daily reports, identifying which employees worked on the jobsite and what work was performed. From these daily reports companies generate monthly payroll reports, certifying their accuracy. These payroll reports are called certified payroll reports. Labor compliance departments will then use these certified payroll reports to determine if companies are in compliance with the prevailing wage rate standards. (Tr. 237, 306-307)

Since the Banning job project was a public works project, Respondent had to adhere to prevailing wage standards. Guardado and Delgado testified that while working at the Banning jobsite, labor compliance officers regularly came to the jobsite to talk to employees. (Tr. 83, 142) The labor compliance agents asked employees about their wages and the work they performed. (Tr. 142) One of the labor compliance officers who visited the jobsite is named Sheri Patton, team labor compliance for the Banning School District. (Tr. 142)

2. Union Meetings

Between October and November 2010, agents of Plumbers and Pipefitters Union made visits to the Banning jobsite and spoke to employees, including Guardado. (ALJD 3: 22-24) . One such agent was Charles Stratton ("Stratton"), organizer for Plumbers and Pipefitters Union, Local 398 ("Union") and representative of District Council 16. (Tr. 13, 81)

In November 2010, employees, including Guardado and Delgado, attended a Union meeting. In the meeting, the employees told Union agents that they were not getting paid correctly; they felt they were not being treated fairly; and they had concerns that Respondent was not properly funding their 401K Plan. (ALJD 3: 11-13) (Tr. 18) Guardado told the Union that he worked inside the building at the Banning jobsite but was getting paid as a pipe tradesman. The Union agents told Guardado that since he was working inside the building he should be earning a plumber's wages. (ALJD 3: 15-16) (Tr. 85-86)

In around November or December 2010, there was a second Union meeting, which Guardado, Delgado, and Rivera attended. (ALJD 3: 16-17) (Tr. 87, 143) Employees again told the Union agents that Respondent was not funding employees' 401K Plan and not paying into employees' healthcare insurance. (ALJD 3: 16-19) (Tr. 19, 146) Guardado testified that the employees again stated that Respondent was not paying him the correct wage rate for the work he was performing. Guardado, Rivera, and Delgado supplied the Union agents with copies of their paystubs. (Tr. 88-89, 147)

Thereafter, Stratton contacted Piping Industry Progress and Education ("PIPE") and asked that PIPE request a certified payroll report from Respondent for the Banning jobsite project. (Tr. 19-20) PIPE is the trust fund under District Council 16, which maintains a work

preservation system to ensure that prevailing wages are paid to employees on public works projects. (ALJD 3: 25-28) (Tr. 16)

3. Respondent Learns of Employees' Protected Conduct

Covarrubias, Guardado's wife, worked directly with Pamela Leonard in Respondent's office. There were only three office workers: Pamela Leonard, Covarrubias, and Trina Wellsandt ("Wellsandt"), office manager. (Tr. 30, 202, 342) Covarrubias did not have an enclosed office space. Rather, Covarrubias' desk was just outside Pamela Leonard's office door. (GCX 4) (Tr. 31, 33)

Pamela Leonard testified that in about November 2010, Respondent began receiving calls from Sherry Patton ("Patton"), team labor compliance agent for the Banning Unified School District, over employees' complaints. Around the same time, representatives from the U.S. Department of Labor ("DOL") began calling Respondent over employees' complaints of unfunded 401K plans. (ALJD 3: 30-32) (Tr. 206-207) Pamela Leonard was aware that the complaints came from employees at the Banning jobsite. (Tr. 208) At the time only Guardado and Delgado worked at the Banning jobsite. Patton requested a copy of Respondent's certified payroll for the Banning jobsite. (ALJD 3: 34-35) (Tr. 344, 346-348)

Pamela Leonard testified that when complaints to labor compliance are not resolved, it can detrimentally impact a company's business as a payment to the company can be withheld. On all job projects, ten percent of the company's contract amount is retained by the general contractor or school district in a retention account. The retention account is maintained until the work is final and complete, which includes any outstanding labor compliance disputes. (Tr. 244-245, 345)

Covarrubias recalled that once the labor compliance department began calling Respondent, Pamela Leonard, repeatedly remarked to Covarrubias that she wanted to find out who had been talking to labor compliance and who initiated the complaint to labor compliance. (ALJD 3: 36-38) (Tr. 35, 49-50) Similarly, Wellsandt testified that Pamela Leonard questioned Covarrubias about whether Guardado knew where the complaint came from. (ALJD 3: 38-40) (Tr. 344) Pamela Leonard admitted that she verbalized an interest in determining who was complaining to labor compliance but characterized her interest as mere "brainstorming" over which employee could be the one complaining. (Tr. 270) However, Wellsandt testified that Pamela Leonard was concerned of the repercussions on the business if the labor compliance complaint became formal, which it later did. (Tr. 345)

Covarrubias testified that when the Union agents began visiting the Banning jobsite, sometime in November or December, Pamela Leonard began asking Covarrubias if Guardado was talking to the Union and if she knew what the Union was doing at the Banning jobsite. (ALJD 3: 45-48) (Tr. 36-37, 39-40, 53-54) Pamela Leonard would ask Covarrubias if she knew what Guardado was telling the Union or what she heard about Guardado and the Union. (Tr. 40, 53-54) Covarrubias also informed Pamela Leonard that Guardado gave the Union his paystubs. (ALJD 3: 3-4) (Tr. 41, 58)

4. Formal Complaint Filed by the Union

As a result of the complaints to labor compliance an investigation was initiated over the payment of prevailing wages on the Banning jobsite project. (GCX 2) On February 23, 2011, PIPE filed a formal complaint against Respondent on behalf of Guardado, alleging that Respondent paid Guardado pipes tradesmen wages while working him as a plumber at the

Banning jobsite when he should have received the plumbers' prevailing wage rate. (GCX 3) Ultimately, a finding was made that Guardado and three additional employees were paid outside of their job classification. (ALJD 3: 39-40) (Tr. 209)

Due to the formal complaint, Respondent's retention money was withheld. By the time of the unfair labor practice hearing, Respondent still had not received its retention money because of the outstanding labor compliance. (Tr. 349-350)

E. December 17, 2010 – Guardado's Layoff

While working at the Banning jobsite, Guardado and Delgado carpooled together. On December 17, 2010, they arrived to work late. On this morning, Patrick Leonard was present on the site inside the jobsite trailer. (ALJD 4: 16-19) (Tr. 89-90, 148) Patrick Leonard immediately began yelling at them for being late and that the daily work logs were incorrect. Delgado testified that Patrick Leonard said that it was "fucking bullshit" that they were late and their being late was the reasons why his company was failing. (ALJD 4: 19-21) (Tr. 150, 317-318)

Guardado reminded Patrick Leonard that he had to carpool with Delgado and that he was not responsible for completing the daily work logs. (ALJD 4: 20-21) Guardado also told Patrick Leonard that he was not innocent either, since Respondent had Guardado working in the building as a plumber. (Tr. 120) At some point in the conversation, Guardado told Patrick Leonard that if he did not like it he could fire him right then. (ALJD 4: 23) (Tr. 151, 173-174)

Pamela Leonard conceded that it is not out of ordinary for Patrick Leonard to yell at employees nor is it unusual for him to curse at employee or for employees to curse at each other. In fact, such conduct is quite common in the industry. (Tr. 205)

Later the same day, Patrick Leonard, still at the Banning jobsite, approached Delgado and told him that he should be able to complete the job over the next 2 to 3 weeks. Patrick Leonard then told Delgado that he would be working on the Banning jobsite alone because he was going to let Guardado go. (ALJD 4: 24-25) Delgado replied that he hoped that Patrick Leonard did not expect him to complete the job project in 2 to 3 weeks without Guardado's help because it was not going to happen. Delgado told Patrick Leonard that it was impossible for one person to complete the remaining work in 2 to 3 weeks. (ALJD 4: 25-26) (Tr. 152-153)

Patrick Leonard then spoke to Guardado. At the time Guardado was working inside the building running condensation lines for air-conditioning units. (ALJD 4: 26) (Tr. 93, 110, 321) Patrick Leonard told Guardado that work was slow, there was no work, and as a result, Respondent had to lay him off. (ALJD 4:27) (Tr. 94, 121-122) Guardado objected and stated that there was still work to be done on the Banning jobsite and Respondent had other job projects going on. (ALJD 4: 28) Avoiding eye contact with Guardado, Patrick Leonard denied these claims, asserting that the Banning jobsite was almost done and Respondent had no more work for Guardado. (ALJD 4: 28-29) (Tr. 94, 122, 131)

1. Conversations at the Office About Guardado's Layoff

On December 17, 2010, Patrick Leonard called Pamela Leonard in the office. Because Pamela Leonard answered the call on her speaker phone, Covarrubias overheard a portion of the telephone conversation. (ALJD 4: 32-33) Covarrubias was at her desk, located just outside of Pamela Leonard's office. (Tr. 42) (GCX 2) Covarrubias testified that Patrick Leonard informed Pamela Leonard that he had just let Guardado go because he was late and disrespectful. (ALJD 4: 34) Covarrubias overheard Pamela Leonard say that Patrick Leonard should have let her

know first. Pamela Leonard then took the phone call off speaker and closed her door. (ALJD 4: 34-36) (Tr. 43-44, 62)

Pamela Leonard testified that when Patrick Leonard called her to tell her that he had laid off Guardado, she protested and told him that she was going to send Guardado to the Hillcrest High School jobsite, an on-going jobsite that Respondent had Riverside, California. (ALJD 4: 38-39) (Tr. 275) Pamela Leonard, also claimed that she told Covarrubias to tell Guardado to report to the Hillcrest jobsite. (ALJD 4: 39-40) Covarrubias denied that Pamela Leonard ever instructed her to tell Guardado to report to the Hillcrest jobsite. Instead, well before Guardado was laid off, Pamela Leonard said that she wanted to send Guardado to the Hillcrest jobsite. (ALJD 4: 40-41) Pamela Leonard never called Guardado to tell him to report to Hillcrest. On December 17, Pamela Leonard texted Guardado to call her, but the text message read nothing further. (ALJD 4: 37) (Tr. 201)

2. Pamela Leonard Schedules and Cancels a Meeting With Guardado

After Guardado's layoff, Pamela Leonard arranged a meeting with Guardado, through Covarrubias. Pamela Leonard never personally called Guardado to schedule the meeting. Guardado testified that on the day he was laid off, he received Pamela Leonard's text message but he did not call her as he thought that they would just talk in the scheduled meeting. (Tr. 95, 123-124) However, as the meeting date approached Pamela Leonard canceled the meeting and did not attempt to reschedule it. (Tr. 45, 67-69, 95, 126)

Pamela Leonard testified that ultimately Covarrubias said that Guardado did want to meet. However, Pamela Leonard testified, she had just learned of Guardado's Union involvement and in the end she never called him. (ALJD 5: 26-34) (Tr. 278)

F. Respondent's Available Job Projects

After Guardado's layoff there was still work to be done at the Banning jobsite. Delgado continued to work at the Banning jobsite until its completion in about mid-February 2011. (Tr. 140) While Delgado worked alone for most of the time, Respondent did, from time to time, assign the following employees to work at the Banning jobsite after laying off Guardado: Chad Leonard,[3] Terry ___,[4] and Steve Eagle. (Tr. 187-188, 191)

At the time of Guardado's layoff, Respondent had other jobsites going on. Respondent had the Hillcrest High School jobsite in Riverside, California, which began in February 2009 and continued until December 2011. At the time, Respondent had about 10-15 employees working at the Hillcrest jobsite. At least three to four pipe tradesmen worked on the Hillcrest jobsite throughout 2011. (Tr. 221, 234) When Guardado was laid off, McKeen, foreman, told Pamela Leonard that he had work for Guardado to perform at the Hillcrest jobsite. (Tr. 220) In mid February 2011, when Delgado was transferred to the Hillcrest jobsite, employees were performing topout work inside the building. (Tr. 140, 160) According to Patrick Leonard, when Delgado was transferred to Hillcrest Respondent still needed help on the jobsite. (Tr. 327)

At the time of Guardado's layoff, Respondent had the Field of Dreams jobsite in Perris, California, which began in November 2010, and continued until November 2011. (Tr. 223-224) Pamela Leonard admitted that pipe tradesmen work was performed on the Field of Dreams jobsite in 2011 and at least four to five pipe tradesmen worked there. (Tr. 233)

---

[3] Chad Leonard is Patrick Leonard's son.
[4] The record does not reveal Terry's last name.

In addition, Respondent had the Rio Hondo Community College Physical Education Complex, located in Whittier, California, which began in about March or May 2011, and was still continuing during the February 2012 unfair labor practice hearing. Though this project is a project labor agreement job project, requiring the use of apprentices from State-sanctioned apprentice program, Respondent could still use some of its own core employees in addition to apprentice employees. (Tr. 222, 246)

G. Guardado Was Not Assigned to a Different Jobsite

Although Pamela Leonard claimed that on the day of Guardado's layoff she told Covarrubias to tell Guardado to report to the Hillcrest jobsite, Covarrubias denied that Pamela Leonard made that request. Covarrubias testified that at sometime, *before* the day Guardado was laid off, Pamela Leonard mentioned to Covarrubias that she wanted to transfer Guardado to the Hillcrest jobsite in Riverside, California. (ALJD 4: 41-42) (Tr. 63, 267-277) However, *after* Guardado was laid off Pamela Leonard did not mention transferring Guardado to the Hillcrest jobsite or to any other jobsite. (Tr. 63-64, 74-75) Pamela Leonard did not contact Guardado to tell him to report to Hillcrest or to any other jobsite nor did she send him a letter informing him of the job option. (Tr. 201, 278)

Pamela Leonard claimed that Covarrubias told her that Guardado did not want to work for Jason McKeen ("McKeen"), Hillcrest jobsite foreman. (Tr. 277)

At the hearing, Guardado admitted that McKeen, did not like him (and many other individuals), but Guardado testified that had he been transferred there, he would have still worked under McKeen. (ALJD 5: 6-7) (Tr. 133, 277)

When Guardado went into Respondent's office building to pick up his final paycheck, Pamela Leonard saw Guardado and stood about 12-15 feet from him. Yet she did not speak to Guardado or offer to return him to work. (ALJD 5: 8-10) (Tr. 96-98, 201-202)

H. Respondent Recalled an Employee, Rather Than Guardado

Respondent claims that as a result of the poor economy its business began to suffer in 2010 and in about July 2010, it began reducing its work force. (Tr. 242, 249) Pamela Leonard testified that since Guardado's layoff, Respondent has not hired or recalled from layoff any apprentices. Respondent has, however, recalled pipe tradesmen (Guardado's job classification), like employee Gilberto Ruiz ("Ruiz"), pipe tradesman, who was hired in November 2010, and was laid off a month later in December 2010. (Tr. 250) (GCX 5) By the first quarter of 2011, Respondent recalled Ruiz to work. (Tr. 226-228) (GCX 6) Respondent again laid off Ruiz in about April 2011 and again recalled him. (Tr. 232-233) (GCX 7, 8) Pamela Leonard could not identify any reason why Ruiz was recalled over Guardado. (Tr. 283) At the hearing, Respondent's witnesses claimed that Guardado was difficult to place in a job because he had limited skills and abilities, he had not gone through an apprentice program, and did not perform plumber's work for Respondent. Nevertheless, Pamela Leonard admitted that Ruiz did not have a lot of work knowledge or skill. In fact, she described him as green. (Tr. 282-283) Among the work Ruiz performed when he was recalled in 2011, was cleaning the job site and pumping trenches – the very work of a pipe tradesmen.

Guardado did not have a driver's license when he was laid off, but Pamela Leonard admitted that it was not an obstacle in transferring him to the Hillcrest jobsite. Pamela Leonard

stated that she contemplated ways of working around the issue and which employee to have Guardado ride with. (Tr. 284)

I. January 2011

1. Threat to Layoff

On January 10, 2011, Pamela Leonard testified that she found out that Guardado and Delgado were involved in the Union. (ALJD 5: 35-36) (Tr. 210-211) Pamela Leonard acknowledged that employee Josh Stroud informed her that Guardado and Delgado were Union salts. (Tr. 211) In reaction to this news, Pamela Leonard instructed Wellsandt to compile Delgado's separation paperwork and to cut two payroll checks for Delgado: one payment for the previous week's work and the other payment for the day's work. (ALJD 5: 37) (Tr. 211-212) Pamela Leonard got into her car and drove 40 miles from the office to the Banning jobsite to terminate Delgado. One her way to the Banning jobsite, Pamela Leonard testified that she called Laura Debore ("Debore"), representative for Associated Builders and Contractors ("ABC"), and explained to Debore what was going on and asked what she should do about the situation. Debore told her not to mention the Union involvement at all to Delgado and instead, act nonchalant and layoff Delgado for lack of work, if there was lack of work. (ALJD 5: 38) (Tr. 214)

Once at the Banning jobsite, Pamela Leonard called Delgado to the jobsite trailer and told him that she was letting him go for lack of work. (Tr. 156-157) Delgado asked her who would finish the Banning job. Pamela Leonard only repeated that Delgado was being laid off for lack of work. Then Pamela Leonard revealed to Delgado the true reason for his layoff: she heard from an employee working at the Hillcrest jobsite that Delgado was involved with the Union.

(ALJD 5: 39-40) (Tr. 157, 181, 251) Delgado testified that he was able to save his job by assuring Pamela Leonard that the rumor was untrue and he was not working with the Union. Convinced, Pamela Leonard did not layoff Delgado. (Tr. 158)

2. Conversation with Guardado

In around February 2011, Stratton, Union agent, visited Guardado at his home. On that day, Covarrubias, who was still working with Respondent, came home for lunch. When she returned to work after lunch, Covarrubias informed Pamela Leonard that a Union agent was meeting with Guardado. (ALJD 6: 10-12) (Tr. 99-100, 218) Pamela Leonard called Guardado and asked him what he was telling the Union and whether he was telling the Union about the pay. (ALJD 6: 12-13) (Tr. 99, 125) Pamela Leonard conceded that she knew that Guardado was meeting with the Union at his home. (ALJD 6: 12) (Tr. 219) In the conversation, Pamela Leonard still never told Guardado to return to work.

J. February 2011

On about February 25, 2011, Delgado went to Respondent's office to pick up his payroll check. When he arrived, Pamela Leonard asked to speak with him in her office. Patrick Leonard was present. Pamela Leonard apologized about trying to lay him off. Then she told him that Respondent had found out that it was not Delgado who was involved with the Union, but Respondent discovered that it was Guardado who was working with the Union. (ALJD 6: 18-21) (Tr. 159, 189)

III. ARGUMENT AND CITATION OF AUTHORITY

A. The ALJ Correctly Found that Respondent Unlawfully Interrogated Employee Covarrubias

In its exceptions brief Respondent contends that employees Guardado and Delgado were not interrogated. (RB 11) However, the ALJ never found that Guardado and Delgado were interrogated. Rather, employee Covarrubias was unlawfully interrogated, but Respondent makes not arguments in its exceptions about how the ALJ's decision erred in this regard.

Notwithstanding Respondent's failure to make any arguments about the ALJ's finding that Covarrubias was interrogation, in determining whether an interrogation is unlawful, the Board will examine whether under the totality of the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employee in the exercise of their Section 7 rights. Rossmore House, 269 NLRB 1176 (1984).

Here, Covarrubias testified that beginning in about November 2010, Pamela Leonard began asking her about whether Guardado was involved with the Union. Specifically, Pamela Leonard asked Covarrubias if Guardado was talking to the Union agents and if she knew what the Union agents were doing at the Banning jobsite. Pamela Leonard further questioned Covarrubias whether she knew what Guardado was telling the Union and what she heard about Guardado and the Union. Covarrubias recalled that the questioning began in November 2010 and continued at least until December 2010.

The fact that the two were friends does not lessen the coercive impact of the interrogation. The test for examining unlawful interrogation is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." Multi-Ad Services, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Pamela Leonard's questions

were clearly aimed at testing Covarrubias' knowledge of Guardado's Union activities. Generally, it is unlawful for an employer to inquire as to the union sentiments of its employees. President Riverboard Casinos of Missouri, 329 NLRB 77 (1999). A friendship or a subjective analysis of whether the employee was actually coerced is not the Board standard.

Therefore, the ALJ correctly found that the record supports a finding that Respondent interrogated Covarrubias about the Union activities of Guardado in violation of the Act.

B. The ALJ Correctly Found that Respondent Unlawfully Threatened Employee Delgado

Like with the interrogation finding, Respondent excepts to the ALJ's finding but fails to make any arguments in its exceptions brief supporting its exception. (RB 11) However, the record clearly establishes that Pamela Leonard threatened Delgado. In fact, Pamela Leonard admitted that she made the threat. (ALJD 7: 11-14) On January 10, 2011, an employee told Pamela Leonard that Guardado and Delgado were Union salts. Pamela Leonard admitted that on about January 10, 2011, she threatened employee Delgado with layoff because of his Union activities. Thus, Pamela Leonard testified that once she heard that Guardado and Delgado were Union salts her immediate and determined reaction was to let Delgado go. Pamela Leonard ordered Wellsandt to get Delgado's final paperwork and cut his final two paychecks. Pamela Leonard then drove 40 miles from her office to the Banning jobsite to discharge Delgado. Holding his final documents and paychecks in her hands, Pamela Leonard met alone with Delgado in the jobsite trailer. After initially stating that Delgado was laid off for lack of work, Pamela Leonard came clean with the true reason for his layoff. Pamela Leonard admittedly told Delgado that he was being laid off because she heard he was involved with the Union.

Threatening to layoff employees because of employees' union conduct is a hallmark violation of the Act. See generally, Metro One Loss Prevention Services, 356 NLRB No. 20 (November 8, 2010).

The fact that she did not carry out the threat does not nullify the violation. Indeed, the only reason why Pamela Leonard did not make good on her threat was because Delgado convinced her that the rumor of his Union involvement was not true. Therefore, the ALJ did not err in finding that there is sufficient evidence presented that Respondent threatened an employee with layoff because of his Union and/or protected concerted activities in violation of the Act.

C. The ALJ Correctly Found that Respondent Created the Impression of Surveillance

Respondent contends that it created no impression of surveillance. (RB 10-11) In February 2011, after Respondent threatened Delgado with layoff, Delgado went to the office to pick up his payroll check. While there Pamela Leonard asked to speak with him. This time Patrick Leonard was also present. The Leonards met with Delgado alone in Pamela Leonard's office. Pamela Leonard told Delgado that Respondent had discovered that it had not been Delgado, but it was Guardado who was involved with the Union.

The test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the employer's conduct or statement that their union activities were under surveillance. Frontier Telephone of Rochester, Inc., 344 NLRB 1270, 1276 (2005); Bridgestone Firestone South Carolina, 350 NLRB 526, 527 (2007). Here, Respondent, for the second time, met alone with employee Delgado to discuss employees' Union activities. There is no evidence to explain why in this atmosphere Respondent would have raised

the issue of the Union. There is no evidence that Delgado (or Guardado for that matter) was engaged in open, public Union activities. Delgado was simply at the office to pick up his payroll check. The only motive for raising the issue of the Union was to convey that Respondent was surveilling employees' Union activities. The circumstances of Respondent's statement would reasonably lead an employee to believe that his/her Union activities were under surveillance by Respondent. When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring. Metro One supra, slip op. 14.

Therefore, contrary to Respondent's exception, the ALJ correctly found that there is sufficient evidence to conclude that Respondent created the impression that employees' Union activities were under surveillance.

D. The ALJ Correctly Held that Respondent Unlawfully Refused to Recall Employee Guardado

1. Analytical Framework for Section 8(a)(3) Violations

In Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Circ 1981), cert denied 455 U.S. 989 (1982), the Board established a test for deciding cases turning on employer motivation. To determine whether an employee was discriminated against in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. Under the test, the General Counsel must establish four elements. First, the General Counsel must show the existence of activity protected by the Act. Second, Respondent was aware that the employee had

engaged in such activity. Third, the employee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." Wal-Mart Stores, Inc., 352 NLRB 815, fn.5 (2008) (citing Gelita USA, Inc., 352 NLRB 406, 407, fn.2 (2008)).

If the General Counsel is able to make such a showing, the burden of persuasion shifts to Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. Wright Line, supra at 1089. See also Manno Electric, 321 NLRB 278, 280 fn. 12 (1996). Respondent cannot carry this burden merely by showing that it had a legitimate reason for its layoff. Respondent must demonstrate by a preponderance of the evidence that the adverse action would have taken place absent protected conduct by its employees. Roure Bertrand Dupont, Inc., 271 NLRB 443 (1984).

2. *The ALJ Correctly Found that Respondent Unlawfully Failed to Recall Guardado*

a. Guardado Engaged in Protected Activities

In its exceptions brief Respondent claims that it is questionable whether Guardado engaged in protected activities. (RB 4) However, the record fully supports the ALJ's finding that Guardado engaged in both Union and protected concerted activities. (ALJD 8: 31- 9: 4) Guardado, along with other employees, attended Union meetings and sought help with wages and benefits. It is axiomatic that Section 7 of the Act gives employees the right to communicate

with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that the communication between employees "for non-organizational protected activities are entitled to the same protection and privileges as organizational activities." Phoenix Transit Systems, 337 NLRB 510 (2002). In about November 2010, and again in December 2010, Guardado and other employees attended Union meetings, wherein they complained about employees not getting paid the correct wage rates. Guardado specifically complained that while Respondent paid him the lower pipe tradesmen wage rate, he was actually working inside the building performing plumbers' work, which work should have yielded plumbers' wages. The employees complained that Respondent treated them unfairly and was not properly funding their 401K plans. The employees then submitted their paystubs to the Union in furtherance of their fight to receive correct wage rates.

In stark contrast to Respondent's exception, the foregoing is more than "minimal" Union involvement. Moreover, Respondent's suggestion that in order to benefit from the protection of the Act, an employee must be overtly involved in protected activities, is fundamentally wrong. (RB 4) Therefore, the ALJ correctly found that Guardado engaged in both Union and in protected concerted activities.

b. Respondent Was Aware of Guardado's Protected Activities

In its exceptions brief Respondent argues that General Counsel failed to show that Respondent was aware of Guardado's protected activities. (RB 4) However, at the hearing, Respondent's own witness admitted that by January 10, 2011, she was aware of Guardado's protected conduct. On January 10, 2011, an employee told Pamela Leonard that Guardado was a Union salt. Also, in January 2011, Covarrubias told Pamela Leonard that a Union agent was at

her home talking with Guardado. Pamela Leonard called Guardado and asked him what he was telling the Union and if he was telling the Union about the employees' pay issues. Therefore, Respondent knew of Guardado's Union activities. Moreover, prior to January 2011, Pamela Leonard spent 2 months regularly interrogating Covarrubias about Guardado's Union involvement. Therefore, the record evidence supports the ALJ's finding that Respondent had knowledge of Guardado's protected conduct.

c. Failure to Recall Guardado Was Motivated by Anti-Union Animus

The motivational link between Guardado's protected conduct and Respondent's refusal to recall him is animus and timing. Contrary to Respondent's claims, Respondent exhibited strong anti-Union animus. (RB 5) Employees complained to labor compliance agencies through the Union. Respondent argues that since prevailing wage jobs are so heavily regulated, inquires from labor compliance agencies are common and routine. (RB 5-6) Accordingly, Respondent asserts that employees' complaints in this regard were not view negatively by Respondent. This argument contradicts Respondent's testimonial evidence. Wellsandt testified that Pamela Leonard questioned Covarrubias about who initiated the compliant and Leonard was concerned of the repercussions the complaint would have on her business. Indeed Pamela Leonard testified that unresolved labor compliance complaints could have a significant detrimental impact on a company. In this case, the labor compliance complaints resulted in the filing of a formal compliant and Respondent's retention money begin withheld. Despite the fact that it is unlikely that Pamela Leonard first learned of Guardado's protected conduct after he was laid off, she admitted to learning of it on January 10, 2011. Pamela Leonard further testified that her immediate reaction was to terminate the remaining employee involved in the Union activities:

Delgado. Pamela Leonard ordered her office manager to gather Delgado's final paperwork and last two paychecks. She then drove 40 miles from her office to the Banning jobsite to confront Delgado and to lay him off. Once at the jobsite she told Delgado that she discovered that he was involved with the Union and she was letting him go as a result. This is classic example of anti-union animus. It can be concluded then that Respondent harbored the same animus against Guardado's protected activities. After all Pamela Leonard learned of both Guardado's and Delgado's Union activities at the same time, from the same person.

Therefore, there is sufficient record evidence to support the ALJ's conclusion that the refusal to recall Guardado was unlawfully motivated.

d. The ALJ Appropriately Rejected Respondent's Defense

Respondent argues that Guardado was laid off and not recalled because Respondent's business suffered an economic downturn and because there was no available work. (RB 6-10) However, the record shows that work remained to be completed at the Banning jobsite from which Guardado was laid off and never recalled. When Guardado was laid off, Delgado told Respondent that there was no way he could complete the Banning job project in 2 weeks without Guardado. In the end, it took Delgado 2 months to complete the Banning job project and Respondent never recalled Guardado to the jobsite.

Respondent refused to recall Guardado to work at the Banning jobsite, but assigned three different employees to work there after Guardado was laid off purportedly for 'lack of work.'

While Respondent asserts that the poor economy is why Guardado was not recalled, Respondent had other jobs projects throughout 2011 – after laying Guardado in December 2010. (ALJD 9:46-48) Respondent had the ongoing jobsite at Hillcrest, which continued until

December 2011 and the Field of Dreams job project that continued until November 2011. Pamela Leonard admitted that on the day Guardado was laid off, McKeen, Hillcrest jobsite foreman, told her that he had work for Guardado on that jobsite. Yet, Respondent never transferred Guardado to the Hillcrest job.

Respondent claims that Pamela Leonard wanted to return Guardado to work but Guardado declined. (RB 7) The ALJ specifically discredited this claim and, in fact, found it a fabrication. (ALJD 10: 3-6) Moreover, Respondent did not write to Guardado to tell him to report to the Hillcrest jobsite or to any other jobsite. Respondent's position that Covarrubias was told to tell Guardado to report to Hillcrest is self-serving. Even when, as the ALJ reasoned, Guardado came into the office to pick up his last paycheck mere days after being laid off, Pamela Leonard saw him and stood no more that 15 feet from him, yet she admitted that she made no offer of recall. (ALJD 10: 5-9) When Pamela Leonard found out that a Union agent was at Guardado's home she called him. Not once during the conversation with Guardado did she offer to recall him to any jobsite. Thus, the record evidence establishes Respondent never sought to return Guardado to work.

Respondent's exceptions brief characterizes Guardado as having "low credentials", "minimal skills", and lacking in formal education. (RB 7-8) These assertions are utterly baseless. In spite of never entering or completing an apprenticeship program, Respondent continued to employ Guardado for nearly 10 years. As an employee with Respondent Guardado worked as a pipe tradesman – outside the building; and as a plumber – inside the buildings. Guardado ran water, gas, and sewer pipes and lines, installed roof drains, installed condensation lines, water heaters, sinks and toilets. All tasks that are typically performed by a plumber. Respondent presented no documents or evidence showing that there were any problems with

Guardado's work performance, his skills, or abilities to perform these job tasks. Yet, Respondent now claims that Guardado did not have the requisite skills to do plumbing work and he had limited abilities. Contradicting Respondent's argument is the fact that on the very day that he was laid off, Guardado was working *inside the building performing plumbers' work.* Respondent had available pipe tradesmen work at other jobsites. Respondent conceded that throughout 2011, it had pipe tradesmen work at both the Hillcrest jobsite and at the Field of Dreams jobsite. In fact, in 2011, there were at least three or four pipe tradesmen working at Hillcrest and four of five working at the Field of Dreams jobsite.

Still more evidence of why Respondent's defense was properly rejected is that fact that Respondent recalled employee Ruiz. Respondent laid off Ruiz in December 2010, yet recalled him in early 2011. Respondent laid off Ruiz for a second time in about April 2011, only to again recall him to work. Pamela Leonard acknowledged that Ruiz lacked the skills and knowledge for the job and she even described him a green. Pamela Leonard could not testify to a single reason why Ruiz, an unskilled employee, would have been recalled to work over Guardado, a 10-year employee with no work-related performance or disciplinary issues.

The record demonstrates that it was not the poor economy or Guardado's skills and experience that motivated Respondent not to recall him. Respondent's problems with Guardado began once he engaged in protected conduct. (ALJD 10: 11-15) Accordingly, Respondent's defense to its refusal to recall Guardado was properly rejected as a sham defense.

E. Guardado's Immigration Status is Irrelevant at the Merit Phase and was Handled Appropriately by the ALJ

As noted in GC exhibits,[5] prior to the hearing Respondent took the position that employee Guardado was not legally entitled to work in the United States and that in light of the Board's decision in Mezonos Maven Bakery, 357 NLRB No. 47 (August 9, 2011), Respondent would not enter into a settlement that included reinstatement and backpay for Guardado. The Region looked further into Guardado's immigration status and neither Mezonos nor Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137 (2002), seemed to apply. The appropriate remedy for an employee in Guardado's situation appeared to be an unsettled area of law. Nevertheless, the Region offered Respondent a settlement that excluded reinstatement and backpay, submitted the issue to the Division of Advice ("Advice") for guidance and for approval, and informed Respondent that settlement was conditioned up Advice's approval. Advice declined to approve the settlement, reasoning that the appropriate remedy for an employee in Guardado's situation is indeed an unsettled area of law.

Respondent excepts to the ALJ not enforcing the informal settlement agreement. (RE 3-4; RB 12-13)

The Supreme Court has long held that undocumented workers are employees under the Act and enjoy protection from unfair labor practices without regard to their immigration status. Sure-Tan, Inc. v. NLRB, 476 U.S. 883 (1984). The merit phase of the unfair labor practice hearing proceeding is exclusively focused on the legality of Respondent's layoff and failure to recall employee Guardado. It is well-established Board precedent that the issue of a discriminatee's immigration status in the United States is irrelevant at the unfair labor practice

[5] GCX 1(ab), 1(ac), and 1(ae).

hearing and should be litigated at the compliance stage, if appropriate, where issues of entitlement to backpay and reinstatement are resolved. Tuv Taam Corp., 340 NLRB 756, 759-761 (2003); Case Farms of North Carolina, 353 NLRB 257, 263 (2008). Accordingly, an individual's immigration status is irrelevant to Respondent's liability under the Act and questions concerning that status should be left to the compliance stage. See Intersweet, Inc., 321 NLRB 1, fn 1 (1996) enfd. 125 F.3d 1064 (7th Cir. 1997).

In Tuv Taam Corp., supra, the Board was faced with an attempt by an employer to litigate an employee's immigration status in an unfair labor practice proceeding. The Board rejected the employer's attempt and concluded that even after the Supreme Court's decision in Hoffman Plastic Compounds,[6] conditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented workers whom an employer knowingly hires. In Tuv Taam Corp., the Board stated:

> ... [a]n individual's immigration status is irrelevant to a respondent's unfair labor practice liability under the Act. Questions concerning the employee's status and its effect on the remedy are left for determination at the compliance stage of a case. A.P.R.A. Fuel Oil Buyers Group, Inc., [320 NLRB 408, 415-417 (1995), affd. 134 F.3d 50 (2nd Cir. 1997)]; Intersweet, Inc., 321 NLRB 1, fn. 1 (1996), enfd. 125 F.3d 1064 \ (7th Cir. 1997) .... [w]e shall leave to the compliance phase of these proceedings the determination whether any of the discriminatees are legally "unavailable" for work and whether, thus, the accrual of backpay must be tolled during any period when the discriminatees were not "lawfully entitled to be present and employed in the United States." Hoffman, supra at 1281, citing Sure-Tan, Inc. v. NLRB, 467 US 883 (1984) .... We simply find that here, where immigration status has no bearing on whether the Respondent did, in fact, commit the unfair labor practices of which it has been accused, questions regarding employee status must be litigated at compliance, and cannot insulate the Respondent from a decision on the merits of the compliant allegations or the consequences of its unlawful conduct.

[6] 535 U.S. 137 (2002), wherein the Supreme Court reversed enforcement of a Board order awarding backpay to an undocumented worker whom the employer hired without knowledge of his immigration status. The Court held that the Board had no authority to award backpay to undocumented workers who had never been legally authorized to work in the U.S. and who had presented fraudulent immigration documents to the employer to obtain work.

Since this is the merit phase of the proceeding, Guardado's immigration status is not relevant. Accordingly, in spite of Respondent's exception, the ALJ properly ordered reinstatement and backpay to Guardado.

F. The ALJ's Credibility Resolutions Should Not be Overturned

Respondent advances a general exception that the ALJ failed to make credibility resolutions in Respondent's favor. (RE 5; RB 13) Respondent generally claims that its witnesses testified more candidly and in greater detail, yet this testimony was ignored by the ALJ. This is not true. The truth is that the ALJ weighed the testimony and other evidence and simply did not credit Respondent's witnesses in many areas of the case. A failure to credit is not evidence that the ALJ flat out ignored testimony or did not thoughtfully weigh evidence. It is settled Board policy not to set aside an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence convince the Board that the resolutions are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondent's generalized, non-specific accusations fall woefully short and should be rejected.

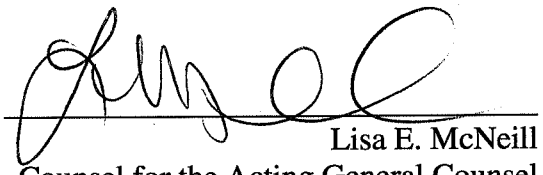
G. Respondent's Arguments Relating to the Board Quorum Should be Rejected

In its exceptions brief, Respondent argues that the Board lacks a quorum and any action on this case should be deferred and tolled. (RE 6; RB 13) However, the Board declines to determine claims challenging the validity of Presidential appointments. Center for Social Change, Inc., 358 NLRB No. 24 (March 29, 2012) Accordingly, Respondent's exception should be rejected.

IV. CONCLUSION

The ALJ's findings are supported by the record and by Board law. Respondent's exceptions are without merit should be rejected in their entirety and the ALJ's recommended Order should be adopted, modified by the Acting General Counsel's exceptions.

Respectfully submitted



Lisa E. McNeill
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

Dated at Los Angeles, California this 28th day of June, 2012.

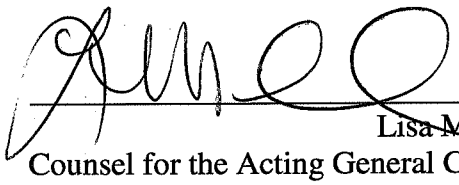
STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief was submitted by E-filing to the Washington, D.C. on June 28, 2012.

The following parties were served with a copy of that document by electronic mail on June 28, 2012.

Thomas A. Lenz, Attorney at Law
Atkinson, Andelson, Loya, Ruud & Romo
tlenz@aalrr.com

Chuck Stratton, Organizer
Plumbers and Pipefitters Local 398
strattonc@aol.com



Lisa McNeill
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21